EDITOR'S NOTE

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87-607

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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30 pp

QUESTION PRESENTED

Whether an attorney's customary hourly billing rate provides the presumptively reasonable hourly billing rate when calculating a "reasonable attorney's fee" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k).

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption,* E.J. Scheyder, Commander, Mare Island Naval Shipyard, was sued in the district court in his official capacity, but he was dismissed from the case by stipulation before the district court entered judgment.

* In accordance with Supreme Court Rule 40.3, James H. Webb, Jr., has been substituted for John Lehman, who was sued in his official capacity as Secretary of the Navy.

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JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of James H. Webb, Jr., Secretary of the Navy, hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 811 F.2d 1341. The order of the district court (App., *infra*, 5a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1987. A petition for rehearing was denied on June 29, 1987 (App., *infra*, 9a). On Sep-

tember 17, 1987, Justice O'Connor entered an order extending the time within which to file a petition for a writ of certiorari to and including October 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. 2000e-5(k) provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

1. In 1978, respondent Carmelo Maldonado, a pipefitter at the Mare Island Naval Shipyard in Vallejo, California, brought suit against the shipyard, alleging that he had been denied a promotion due to discrimination. The suit was settled, and respondent was promoted to foreman in 1980. In April 1982, respondent filed a complaint with the Equal Employment Opportunity Commission alleging that he had suffered various forms of reprisal for having brought his earlier suit. Following a hearing, a hearing examiner issued a recommended decision in which he found that respondent had been subjected to reprisal. The Secretary of the Navy adopted the examiner's findings. The Secretary also informed respondent that his attorney, Robert Atkins,[1] was entitled to present a claim for reasonable attorney's fees and costs to the Navy. App., *infra*, 2a.

[1] Atkins received his law degree in 1979. In 1982, Atkins was a third-year associate with the San Francisco law firm of Erickson, Beasley & Hewitt. Excerpts of Record (E.R.) 62.

Atkins thereafter presented an affidavit of fees and costs. He declared he had performed 164.1 hours of work and sought a fee based on a rate of $110 per hour and $398.20 in costs. The Navy agreed to the number of hours spent by Atkins and the amount of costs, but the Navy rejected Atkins' sought-after rate of $110 per hour on the ground that it was excessive. Atkins' customary billing rate was $80 per hour, and the Navy offered to pay respondent a fee consistent with that rate, amounting to approximately $81 per hour. App., *infra*, 2a-3a.[2]

2. Dissatisfied with the Navy's offer, Atkins filed suit against petitioner in the United States District Court for the Eastern District of California, seeking attorney's fees pursuant to 42 U.S.C. 2000e-5(k) and 2000e-16(d). Atkins contended that he was entitled to an award of fees based on a $110 hourly rate. To support his claim, Atkins submitted affidavits stating that other lawyers in the San Francisco and Oakland areas commanded similar hourly rates for their services in comparable cases (App., *infra*, 3a). Petitioner argued that Atkins was not entitled to a $110 hourly rate because his customary billing rate for similar cases in 1983 was $80 per

[2] The Navy awarded Atkins $95 per hour for his work at administrative hearings, and $75 per hour for his non-hearing work. These rates were consistent with Atkins' customary hourly rate, and they corresponded to the maximum rates awarded to attorneys by the Merit Systems Protection Board for cases arising at the Mare Island Naval Shipyard. E.R. 195-198. We do not ask the Court to award fees in these amounts, however, and they are irrelevant to the question presented by this petition.

hour and the fee agreement between Atkins and respondent in this case was based on an $80 per hour rate (E.R. 204, 207, 214, 218). In addition, petitioner pointed out that Atkins had conceded that his customary billing rate for cases not compensated by a contingent fee involving "wills, contracts, real estate acquisition, partnership dissolution, and personal injury defense" ranged from $60 to $80 per hour (E.R. 219). Because the fee proposed by the Navy was consistent with Atkins' customary billing rate, petitioner maintained that, under *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984) (holding that an attorney's customary billing rate is the presumptively reasonable rate for calculating an attorney's fee award), cert. denied, 472 U.S. 1021 (1985), Atkins' request for a $110 per hour fee should be denied.

The district court rejected petitioner's argument. At a hearing on respondent's motion, the district court stated that respondent was entitled to his sought-after community hourly rate because his own customary rate "is somewhat falling behind the times" (10/21/85 Tr. 14).[3] The court thereafter entered an order awarding fees (App., *infra*, 5a-7a). The court acknowledged that Atkins' customary billing rate was $80 per hour (*id.* at 6a), but stated, without elaboration or explanation, that a $110 per hour rate was reasonable nevertheless (*ibid.*). The court gave no explanation why Atkins should be compensated at a rate more than one third in excess of his customary hourly billing rate.[4]

3. Petitioner appealed, and the court of appeals affirmed (App., *infra*, 1a-4a). Petitioner argued that the district court applied an erroneous legal standard in selecting the hourly rate, and invited the court of appeals to adopt the method approved in *Laffey* for determining a lawyer's reasonable hourly billing rate. The court rejected petitioner's argument on the ground that it was foreclosed by prior Ninth Circuit case law (*id.* at 3a-4a). The court stated that an attorney's customary hourly rate is relevant, but it is not an abuse of discretion for a district court to rely on " 'the reasonable community standard that was employed here' " to calculate a fee award (*id.* at 4a (citation omitted)).

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[3] After concluding that San Francisco was the relevant legal community, the district court stated that (10/21/85 Tr. 13-14):

> the next issue is the reasonable rate that can be charged and which emanates from that relevant community of San Francisco. Again, with all due respect, I have no problems in finding the reasonable rate. I take into consideration counsel's customary rate[,] which is somewhat below the so-called reasonable rate in [the] community. However, I also take into consideration the so-called customary rate in this case is somewhat falling behind the times, it's somewhat below—it's not the reasonable rate that is normally paid to those who somewhat specialize in the area.
>
> In any event, the reasonable rate emanating from the community is not so unreasonable as compared with the customary rate as to make it impossible for this Court to make such a finding there to. For all of those reasons, I will find, having found that the Bay Area is, in fact, the appropriate area, that the reasonable rate to be charged in the community that will be charged in this case is $110 per hour.

[4] In fact, the court denied respondent's request for a multiplier on the ground that "the results in the case were not exceptional and the risk of nonpayment was not great" (App., *infra*, 6a).

REASONS FOR GRANTING THE PETITION

This case presents an important, unsettled, and frequently recurring question concerning the proper method of calculating a reasonable attorney's fee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), and scores of other fee-shifting statutes. The Court has recognized that attorney's fees awards should be sufficient to attract competent counsel without providing lawyers with windfalls. To achieve that goal, the Court has required that a fee award for a salaried attorney employed by a legal aid organization should be calculated on the basis of the prevailing community rate for similar services by attorneys of reasonably comparable skill, experience, and reputation. *Blum* v. *Stenson*, 465 U.S. 886, 895-896 n.11 (1984). The Court has not yet endorsed a method for determining the reasonable hourly rate for an attorney with an established billing history. This case, which creates an express conflict among the circuits regarding the proper method for determining the reasonable hourly rate for such attorneys, offers the Court an opportunity to provide needed clarification of the law in this area.

1. The Ninth Circuit's decision in this case squarely conflicts with the District of Columbia Circuit's decision in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (1984), cert. denied, 472 U.S. 1021 (1985). See also *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43 (D.C. Cir. 1987); *Sierra Club* v. *EPA*, 769 F.2d 796, 811-812 (D.C. Cir. 1985). In *Laffey*, counsel for the prevailing parties in a Title VII lawsuit sought attorneys' fees under 42 U.S.C. 2000e-5(k) based upon an hourly rate that was consistent with a composite prevailing market rate, but that exceeded counsel's own customary

billing rate. The court of appeals expressly rejected that claim, holding that an attorney's customary billing rate constitutes the presumptively reasonable rate to be used in calculating a fee award as long as it is not aberrationally high or low. An attorney's fee award should thus be calculated on the basis of counsel's customary billing rate even if it differs, perhaps greatly, from a composite average market hourly rate. 746 F.2d at 16-25.[5] As the District of Columbia Circuit recently put it, "[i]n this circuit, the rule is * * * [that] if an attorney has a customary billing rate, that rate constitutes the presumptively reasonable rate to use in computing a fee award. In general, only if the attorney himself has no customary billing rate may the court base its fee award on a composite average market hourly rate." *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 47-48.

In this case, petitioners relied on the *Laffey* decision in arguing that the district court applied an erroneous legal standard in calculating respondent's

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[5] The *Laffey* court explained that an attorney seeking compensation must provide evidence of the rate he customarily charges in private representation. That rate presumptively serves as the reasonable market rate for his services. Next, counsel must provide evidence that enables the court to determine whether that hourly rate falls within the reasonable range of hourly rates billed by other lawyers for similar work in the same community. In calculating the appropriate range of reasonable hourly rates, a court would disregard abnormally high and low billing rates. As long as an attorney's customary rate fell within that range, it serves as the reasonable hourly rate at which an attorney's fee would be calculated. *Laffey*, 746 F.2d at 24-25.

fee. The Ninth Circuit expressly rejected the approach endorsed in *Laffey* and upheld the district court's fee award even though it was based on an hourly rate that substantially exceeded Atkins' customary hourly fee (App., *infra*, 3a-4a, 6a). In so doing, the court of appeals offered no reason why Atkins should be compensated by the Navy at an hourly rate more than a third higher than what he obtained in the market for private representation. This conflict demands resolution by this Court.

2. The decision below is also incorrect. By ruling that district courts have discretion to disregard an attorney's customary billing rate and to award fees that are calculated on the basis of a composite market hourly rate, the court of appeals approved a fee award more than one third in excess of the rate that respondent's counsel commands from fee-paying clients. That outcome is utterly inconsistent with the rationale underlying fee-shifting statutes and is unsupported by this Court's decisions.

Fee-shifting statutes exist to provide plaintiffs with meritorious claims a fee sufficient to attract competent attorneys, not to improve the financial condition of lawyers. As this Court recently explained in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (July 2, 1986) (*Delaware Valley I*), slip op. 17-18, "[fee-shifting] statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or

threatened violation of specific federal laws."[6] A reasonable attorney's fee therefore is one that will induce attorneys to handle meritorious cases without paying plaintiffs a windfall.[7]

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[6] See also S. Rep. 94-1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 8 (1976); *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985); *Blum* v. *Stenson*, 465 U.S. 886, 893-894 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983).

Neither the text nor legislative history of 42 U.S.C. 2000e-5(k) contains directions for calculating a reasonable attorney's fee. *Delaware Valley I* involved Section 304(d) of the Clean Air Act, 42 U.S.C. 7604(d), but the Court concluded that it should be interpreted in accordance with the case law addressing the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. That Act was patterned after the attorney's fee provisions of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k). S. Rep. 94-1011, *supra*, at 4; *Hensley* v. *Eckerhart*, 461 U.S. at 433 n.7; *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n.4 (1980). The Court has stated that the approach for determining a reasonable attorney's fee under 42 U.S.C. 1988 is applicable to other fee statutes as well. *Delaware Valley I*, slip op. 13-21; *Hensley* v. *Eckerhart*, 461 U.S. at 433 n.7. The lodestar approach endorsed in cases such as *Delaware Valley I* is therefore applicable to this case.

[7] See *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 49; *Lenard* v. *Argento*, 808 F.2d 1242, 1247 (7th Cir. 1987) ("The statute allows only a reasonable fee. This means a fee large enough to induce competent counsel to handle the plaintiff's case, but no larger."); see also *Coulter* v. *Tennessee*, 805 F.2d 146, 148-149 (6th Cir. 1986) ("Congress intended to provide an economic incentive for the legal profession to try meritorious cases defining and enforcing statutory policies and constitutional rights in a variety of fields of legal practice. Congress did not intend that lawyers, already a relatively well off professional class, receive excess compensation or incentives beyond the amount necessary to cause competent legal work to be performed in these fields."), cert. denied, No. 86-1660 (June 8, 1987).

The approach followed in *Laffey* fully serves that goal. A lawyer's customary billing rate provides a precise measure of the value of his time and effort, even if that rate is less than what is charged by other attorneys in the legal community. It is unnecessary to compensate a lawyer, such as Atkins, more handsomely in order to attract him to this type of case. In other words, if a lower hourly dollar award is sufficient to attract competent attorneys in general, and Atkins in particular, to litigation of the type at issue here, that hourly rate completely satisfies the purpose of a fee-shifting statute by ensuring that like attorneys will take on such cases. Any greater amount is unnecessary to attract competent lawyers and constitutes a windfall by definition. *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 49; see Berger, *Court Awarded Attorney's Fees: What is "Reasonable?"*, 126 U. Pa. L. Rev. 281, 321 (1977).[8]

This case illustrates that principle. An award based on an $80 per hour rate would have exactly

[8] As one commentator has observed (Berger, *supra*, 126 U. Pa. L. Rev. at 321 (*quoted in Laffey*, 746 F.2d at 18)):

> The court must determine a value for the attorney's time that will place statutory fee cases on a competitive economic basis * * *. For lawyers engaged in customary private practice, who at least in part charge their clients on an hourly basis regardless of the outcome, the marketplace has set that value. For these attorneys, the best evidence of the value of their time is the hourly rate which they most commonly charge their fee-paying clients for similar legal services. This rate reflects the training, background, experience, and previously demonstrated skill of the individual attorney in relation to other lawyers in that community.

offset the opportunity cost to Atkins from representing respondent because, by his firm's own estimation, that fee accurately reflects his background, experience, and skill relative to that of other attorneys in the community. Moreover, the lower courts' decision to inflate Atkins' customary rate by more than one third resulted in an hourly rate that substantially exceeded what Atkins historically had charged other parties, including civil rights claimants, and even exceeded the rate that Atkins had agreed to charge respondent.[9]

The primary argument to the contrary is that this Court's decision in *Blum* v. *Stenson*, 465 U.S. 886 (1984), requires a composite market hourly rate to be used to calculate all fee awards. *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 55-60 (Wald, C.J., dissenting); *Laffey*, 746 F.2d at 32-33 (Wright, J., dissenting). That argument rests largely on the statement in *Blum* that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." 465 U.S. at 894. A composite market rate must be used for all attorneys, the argument goes, to ensure that fees are calculated in the same way for both private, for-profit attorneys and lawyers em-

[9] The lower courts' reliance on a community standard hourly rate is clearly in error even under the abuse of discretion approach followed by the court of appeals. Discretion must be exercised in a principled fashion. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416-417 (1975). The court of appeals, however, gave no explanation why a district court has discretion to augment an attorney's hourly billing rate simply because the defendant must foot the bill.

ployed by a non-profit legal services corporation. Properly read, however, the decision in *Blum* is not contrary to the approach taken in *Laffey*.

Blum endorsed a market rate approach, rather than a cost-based approach, because the legislative history of 42 U.S.C. 1988 approved that result. Because there is no market rate for a salaried attorney, *Blum* required courts to calculate a fee based on the relevant composite market rate. When counsel's own rates are available, however, *Blum* does not require a court to blind itself to those rates. Nothing in *Blum* or the legislative history of 42 U.S.C. 2000e-5(k) suggests that a lawyer who receives fees from clients rather than a salary from donors is not reasonably compensated under a fee-shifting statute by reference to his own hourly billing rates. In sum, the statement in *Blum* quoted above must be read in the context of the issue that the Court addressed. That statement does not foreclose the position we urge here, because that question was not before the Court in *Blum*.

3. Basing a fee award on counsel's customary billing rate will also produce several other beneficial results. See generally *Laffey*, 746 F.2d at 18-22; *Mayson* v. *Pierce*, 806 F.2d 1556, 1561 (11th Cir. 1987) (Clark, J., dissenting). *First*, that approach will often eliminate the difficult and sometimes impossible task of calculating a particular, exact market rate from the universe of rates billed by attorneys.[10] *Second*, the approach followed in *Laffey* can lessen, if not sometimes altogether avoid, a second round of litigation over the fee question by providing a losing party with an incentive to settle, since a lawyer's hourly billing rate can be determined objectively.[11] *Third*, the *Laffey* approach will limit the trial judge's ability arbitrarily to punish or reward counsel for either party by setting rates.[12] *Fourth*, that approach avoids the unprincipled, but otherwise inevitable, bat-

[10] Calculating a composite market hourly rate can be an onerous task if done properly. See *Blum* v. *Stenson*, 465 U.S. at 895-896 n.11 ("We recognize, of course, that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult.").

[11] The *Laffey* court predicted that the approach that it adopted would reduce fee litigation by establishing a predictable and objective standard for setting hourly rates. 746 F.2d at 21-22. That prediction was accurate. The United States Attorney for the District of Columbia advises us that the *Laffey* decision has resulted in less litigation over fees. Before the *Laffey* decision, the United States Attorney's office devoted a substantial amount of time comparing the skills and experiences of lawyers to calculate an appropriate market rate. Since *Laffey*, however, litigation over fees has been greatly reduced because of the relative ease of determining an attorney's customary billing rate. The *Laffey* standard has promoted settlements and has reduced second major litigations over fees.

[12] See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (June 26, 1987) (*Delaware Valley II*), slip op. 2 (O'Connor, J., concurring in part and concurring in the judgment) ("To be 'reasonable,' the method for calculating a fee award must be not merely justifiable in theory but also objective and nonarbitrary in practice."); cf. *Delaware Valley I*, slip op. 15 (noting that the 12-factor test adopted in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), has been criticized on the ground that "it gave very little actual guidance to District Courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.").

tle of the experts, as well as the disingenuousness that such a procedure often produces.[13]

4. The question presented by this case has considerable practical importance. More than 100 statutes authorize an award of "reasonable" attorney's fees to a prevailing party,[14] and the Court has indicated that the fees awarded under these acts should be calculated in the same manner. *Delaware Valley I*, slip op. 13-21; *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983). The answer to the question presented by this case not only will govern the award of attorney's fees under Titles II and VII of the Civil Rights Act of 1964, but also will apply to every fee statute in which Congress has authorized an award of "reasonable" fees without a defined hourly rate. The decision below therefore clearly warrants review by this Court.

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[13] Judge Clark criticized as "deplorable" the "past practice of fixing an attorney's 'reasonable hourly rate' by approving the use of affidavits at the extremities. It has been the custom for many years for an attorney seeking court approved fees to submit affidavits from friendly attorneys who state that a reasonable rate is that which approximates the highest rate charged in the community. These affidavits are opposed by those from friends of defense counsel who swear to the reasonableness of the lowest rate which is charged by parts of the legal community." *Mayson* v. *Pierce*, 806 F.2d at 1561 (Clark, J., dissenting).

[14] *Delaware Valley I*, slip op. 14 ("There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.' "); see also *Marek* v. *Chesny*, 473 U.S. at 44-51 (Brennan, J., dissenting) (listing statutes); *Coulter* v. *Tennessee*, 805 F.2d at 152-155 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-1545; 86-1578

D.C. No. CV-S-84-0334-RAR

CARMELO MALDONADO,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

JOHN LEHMAN, in his capacity as Secretary of the Navy; E. J. SCHEYDER, in his capacity as Commander, Mare Island Naval Shipyard, DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding

Argued and Submitted

December 12, 1986—San Francisco, California

Filed March 6, 1987

Opinion by Judge Hall

Before: Alfred T. Goodwin, Harry Pregerson and
Cynthia Holcomb Hall, Circuit Judges

OPINION

HALL, Circuit Judge:

The United States Navy appeals from the district court's award of attorney's fees to Carmelo Maldonado (Maldonado) as a prevailing party in his Title VII, 42 U.S.C. §§ 2000e-16(c), action against the Navy. Maldonado cross-appeals from the district court's refusal to apply a multiplier. This court has jurisdiction over the appeals pursuant to 28 U.S.C. § 1291. We affirm.

I

In 1978, Maldonado, an employee at the Mare Island Shipyard, sued the Shipyard for employment discrimination. The suit settled, and Maldonado was promoted. In 1982, Maldonado filed a complaint with the Equal Employment Opportunity Commission alleging reprisal for his 1978 suit. After a five-day hearing, the Examiner found that Maldonado had experienced reprisal. The Secretary of the Navy adopted the Examiner's findings. Pursuant to 29 C.F.R. § 1613.271(c), the Secretary also found that Maldonado was a prevailing party and, therefore, that his attorney, Robert Atkins (Atkins), was entitled to present a claim for reasonable attorney's fees and costs to the Navy.

Atkins then presented an affidavit to the Navy. He claimed that he had spent 164.1 hours working on Maldonado's case and asked for a fee of $110 per hour and a multiplier of two. He also requested $398.20 in costs. The Navy accepted as reasonable the amount of costs and the number of hours worked. However, the Navy rejected Atkins' requested hourly rate, and, instead, awarded $95 per hour for Atkins' work at administrative hearings and $75 per hour

for his non-hearing work. The Navy claimed that these rates were consistent with Atkins' customary billing rate of $80 per hour. The Navy refused to apply a multiplier because it felt that additional compensation was not warranted.

Maldonado, dissatisfied with the Navy's award of fees, filed a complaint for attorney's fees in district court pursuant to 42 U.S.C. § 2000e-16(c). In support of his request for a fee of $110 per hour, Maldonado submitted affidavits from attorneys in San Francisco showing that other similarly situated attorneys charged from $90 to $135 per hour. The district court found that $110 was a reasonable hourly rate for Atkins' services and assessed the fee award accordingly. The court refused to apply a multiplier. The Navy now appeals the district court's award of fees, and Maldonado cross-appeals the court's refusal to apply a multiplier.

II

In a civil action filed under 42 U.S.C. § 2000e-16(c), the district court reviews the agency's decision de novo. *Chandler v. Roudebush*, 425 U.S. 840 (1976). We review the amount of fees awarded by the district court for an abuse of discretion. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986).

III

The Navy argues that the district court should have calculated the award of attorney's fees using Atkins' customary billing rate rather than the prevailing market rate in San Francisco. *See, e.g., Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985). This Circuit does not follow the legal standard set forth

in *Laffey*. "While evidence of counsel's customary hourly rate may be considered by the District Court, it is not a abuse of discretion in this type of case to use the reasonable community standard that was employed here." *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983).

IV

Maldonado argues that the district court abused its discretion by not applying a multiplier in calculating the award of attorney's fees. Maldonado has the burden of proving that an upward adjustment is necessary to award him a reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 898 (1984). While adjustments are possible, they are rare and must be supported by specific evidence and detailed findings. *Id.* at 898-900. Maldonado failed to establish that an upward adjustment was warranted in this case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ S-84-0334 RAR

CARMELO MALDONADO, PLAINTIFF

v.

JOHN LEHMAN, in his capacity as Secretary of the Navy; E. J. SCHEYDER, in his capacity as Commander, Mare Island Naval Shipyard, DEFENDANTS

[Filed Nov. 5, 1985]

ORDER GRANTING ATTORNEYS' FEES AND COSTS

Plaintiff's motion for an award of attorneys' fees and costs came on for hearing on October 21, 1985 before the Honorable Raul A. Ramirez of the United States District Court for the Eastern District of California. Leigh-Ann K. Miyasato appeared on behalf of plaintiff. Defendant was represented by Joseph E. Maloney, Assistant United States Attorney.

Plaintiff's motion was made under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-16. It was undisputed that the 165.35 hours of work performed by plaintiff's counsel and the $398.20 in costs expended were reasonable, but defendant challenged plaintiff's request for an hourly rate of $110.00 and for a multiplier of 2.0.

The Court finds that the relevant community for purposes of determining the hourly rate for plaintiff's counsel is the San Francisco Bay Area. Although the administrative proceedings in the case were held at Mare Island Naval Shipyard in Vallejo, California, the Court finds that the rates for plaintiff's counsel, Robert Atkins, should be based on the prevailing market rates in the San Francisco Bay Area because it was reasonable for plaintiff to retain counsel from San Francisco. The case involved the specialized fields of federal administrative law and federal employment discrimination law. Only a small number of attorneys are available in Vallejo to handle such cases. Vallejo is only a short distance from San Francisco. Finally, plaintiff had previously been represented by an attorney from Mr. Atkins' firm in an employment discrimination matter and had developed a relationship of trust and confidence with the firm.

Taking into account Mr. Atkins' customary billing rate of $80.00 per hour, but considering that the declarations of San Francisco Bay Area counsel indicate a higher prevailing market rate for similar services, the Court finds that a reasonable rate for Mr. Atkins is $110.00 per hour.

The Court denies plaintiff's request for a multiplier on the grounds that the results in the case were not exceptional and the risk of nonpayment was not great.

Having found that it was reasonable for plaintiff to request payment at the hourly rate of $110.00 for all time expended, rather than to accept the hourly rates paid by defendant ($75.00 for nonhearing time and $95.00 for hearing time), the court further finds that plaintiff's motion for an award of attorneys' fees and costs was reasonable and that plaintiff is entitled to payment for work performed on the

motion. The hours and rates claimed for work performed on the motion were reasonable.

Accordingly, the court awards reasonable attorneys' fees and costs in the amount of $11,143.08, calculated as follows:

For the work of Robert Atkins, 165.35 hours at $110.00 per hour, for a total of $18,188.50.

For costs expended in handling the merits of the case, $398.20.

For the work of John H. Erickson on the motion for attorneys' fees and costs, 3.5 hours at $170.00 per hour, for a total of $595.00.

For the work of Leigh-Ann K. Miyasato on the motion for attorneys' fees and costs, 45.33 hours at $110.00 per hour, for a total of $4,986.30.

For costs expended in handling the motion for attorneys' fees and costs, $474.51.

Credit for amounts previously paid by defendant, $13,499.43.

IT IS ORDERED that plaintiff recover $11,143.08 as reasonable attorneys' fees and costs.

DATED:

/s/ Raul A. Ramirez
RAUL A. RAMIREZ
United States District Judge

APPROVED AS TO FORM:

Dated: October 23, 1985

/s/ Leigh-Ann K. Miyasato
LEIGH-ANN K. MIYASATO
Attorney for Plaintiff
Dated: Oct. 24, 1985

/s/ Joseph E. Maloney
JOSEPH E. MALONEY
Attorney for Defendant

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: CIV-S-84-0334-RAR

MALDONADO

v.

LEHMAN

[Filed Nov. 12, 1985]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT BE AND HEREBY IS ENTERED IN FAVOR OF PLAINTIFF.

NOVEMBER 12, 1985
Date

JAMES R. GRINDSTAFF
Clerk

/s/ Sharon Sinander
S. SINANDER
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-1545 & 86-1578

DC No. CV-S-84-0334-RAR

CARMELO MALDONADO,
PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

JOHN LEHMAN, in his capacity as Secretary of the Navy; E. J. SCHEYDER, in his capacity as Commander, Mare Island Naval Shipyard, DEFENDANTS/APPELLANTS/CROSS-APPELLEES

[Filed Jun. 29, 1987]

ORDER

Before: GOODWIN, PREGERSON, and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181403 60048

No. 87-607

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN H. ERICKSON
LEIGH-ANN K. MIYASATO
Counsel of Record for
Carmelo Maldonado
ERICKSON, BEASLEY
& HEWITT
12 Geary Street
Eighth Floor
San Francisco, CA 94108
(415) 781-3040

QUESTION PRESENTED

Whether the hourly rate awarded to an attorney under Title VII of the Civil Rights Act of 1964, as amended, must be limited solely to the attorney's customary billing rate or may be based as well on the rate prevailing in the community for attorneys of comparable skill, experience, and reputation.

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No. 87-607

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

After prevailing before the Secretary of the Navy on his claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., respondent Carmelo Maldonado brought his motion for attorneys'

fees and costs in District Court. Excerpts of Record (E.R.) 80. In support, Maldonado submitted declarations attesting that the prevailing market rate in the San Francisco area for attorneys of comparable qualifications, experience, and skill in similar cases was at least $110 per hour. E.R. 105. This evidence of San Francisco rates was uncontroverted by the government. E.R. 145. In reaching its decision, the district court considered this evidence, and, in addition, evidence of the customary billing rate of Maldonado's attorney for noncontingent matters. Petition (Ptn.), App., 6a.

Based on this evidence, the district court awarded a rate of $110 per hour for 165.35 hours of work on the merits. However, petitioner Secretary of the Navy claimed that respondent was entitled to no more than $80 per hour under the rule of Laffey v. Northwest Airlines, Inc. 746 F.2d

4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985) -- that, in nearly every case, the rate to be awarded is limited to the attorney's customary billing rate. At issue in this case, therefore, is $4,960.50, the difference between $110 per hour and $80 per hour for 165.35 hours.

The Court of Appeals for the Ninth Circuit affirmed the award of attorney's fees, stating:

> This Circuit does not follow the legal standard set forth in Laffey. "While evidence of counsel's customary hourly rate may be considered by the District Court, it is not a[n] abuse of discretion in this type of case to use the reasonable community standard that was employed here." White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983).
>
> Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir. 1987).

The government's petition for rehearing was denied and the suggestion for rehearing en banc was rejected. Ptn., App., 9a.

SUMMARY OF ARGUMENT

This Court has determined that the hourly rate to be awarded under an attorney's fee statute such as 42 U.S.C. § 2000e-5(k) is calculated according to rates prevailing in the community for attorneys of reasonably comparable skill, experience and reputation. Blum v. Stenson, 465 U.S. 886, 895 and n.11 (1984). In the present case, the Ninth Circuit Court of Appeals correctly affirmed the district court's application of this standard. The government unsuccessfully urged the Ninth Circuit to adopt the method approved by the District of Columbia Circuit in Laffey for determining an attorney's reasonable hourly billing rate.

The rule of Laffey is inconsistent with Blum v. Stenson. Furthermore, any conflict between this case and Laffey will in all likelihood disappear because the

District of Columbia Circuit recently decided to re-examine the Laffey decision if this Court denies the government's petition. Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987), reh'g granted en banc (Oct. 14, 1987), order holding proceedings in abeyance (Nov. 5, 1987).

REASONS FOR DENYING THE WRIT

I

THE DISTRICT OF COLUMBIA CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO ELIMINATE THE CONFLICT BETWEEN CIRCUITS BY OVERRULING LAFFEY

In Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987), reh'g granted en banc (Oct. 14, 1987), order holding proceedings in abeyance (Nov. 5, 1987), a divided court reluctantly applied the Laffey rule that an attorney's customary billing rate is the rate to be awarded "in almost every case." Laffey, 746 F.2d at 24. In varying degrees, each

member of the court cast serious doubt on the continuing validity of Laffey.

In his majority opinion in Save Our Cumberland Mountains, Judge Bork noted that the attorneys in Laffey charged lower than market rates, but that the court could not adjust the attorneys' rates to reflect that lost income. Judge Bork stated: "Whether or not Laffey's position on this point is correct -- and the dissent presents a serious argument that it may not be -- this panel is bound by that position as the law of the circuit." 826 F.2d at 49.

Finding Laffey to be the binding law of the circuit, Judge Ruth Bader Ginsburg filed a concurring opinion in Save Our Cumberland Mountains. However, Judge Ginsburg questioned Laffey's consistency with the Supreme Court's decision in Blum v. Stenson. She stated that Laffey should be reexamined, and declared that: "[W]ere we deciding initially what fee calculation

regime is most compatible with congressional intent, I would vote to treat all fee seekers in the Blum manner." 826 F.2d at 54.

Chief Judge Wald dissented on the issue of Laffey in Save Our Cumberland Mountains. He stated:

> Blum explicitly holds that Congress did not intend statutory fees to vary depending upon the clients a lawyer serves. Thus, someone who typically represents environmentalists is entitled to the same fees as one who represents industry in the same cases, other qualifications being equal. Yet, today this court, harking to the siren song of Laffey, distances itself even further from that congressional intent, establishing a level of statutory compensation that depends solely upon the level of pay the attorney asks from his clients. The highest paid law firm in town whose pro bono work amounts to less than 5% of its billable hours will henceforth receive five times the fee for the same case as the idealistic lawyer who devotes 95% of his practice to nonpaying or low paying clients. If this is what Laffey has wrought, it is time that we or Congress took a harder look.
>
> 826 F.2d at 60 (Wald, C.J., concurring and dissenting).

On September 10, 1987, the plaintiffs' attorneys in Save Our Cumberland Mountains filed and served on the U.S. Department of Justice a petition for rehearing and suggestion for rehearing en banc.[1/] On October 14, 1987, the petition for rehearing was denied and the suggestion for rehearing en banc was granted. App., infra, 1a-2a. On October 21, 1987, the government filed a motion for reconsideration of the order granting rehearing en banc, or in the alternative to hold the en banc proceedings in abeyance.

On November 5, 1987, the court issued an order stating that, after final disposition of the present petition by this

---

1/ The Solicitor General's petition in this case was filed on October 14, 1987 and cites Save Our Cumberland Mountains five times, but fails to mention the fact that a petition for rehearing was pending before the District of Columbia Circuit. Nor does the petition mention that all three judges on the panel in Save Our Cumberland Mountains questioned the validity of Laffey and that two judges expressly found it to be wrongly decided.

by this Court, the court would if necessary consider en banc whether the Laffey decision should

> be overruled to the extent that it holds that in awarding attorneys' fees to a private law firm that customarily charges below the prevailing community rate in order to serve a particular type of client, courts should calculate the "reasonable hourly rate" according to the hourly rates charged in similar cases by that firm, as opposed to rates that reflect the prevailing community rate for similar legal services[.] See Blum v. Stenson, 465 U.S. 886 (1984).

App., infra, 3a-4a.

Thus, the Court of Appeals for the District of Columbia Circuit en banc intends to address the Laffey issue should this Court deny the government's petition.

This Court should not utilize its certiorari jurisdiction to review a conflict, such as that in the present case, which can be resolved by the lower courts. As Professor Moore states:

> [W]here there are cases pending in the lower courts that may well resolve the conflict, or more clearly frame the issue that is the subject of the conflict, certiorari may be denied

> notwithstanding the existence of the conflict. [Footnote omitted.] In sum, "[t]he nub of all these qualifications is that a conflict of decisions may be safely relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should be promptly dissolved." [Footnote omitted.]
>
> 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 817.21 (2d ed. 1985) (quoting Justice Harlan).

If this Court denies the government's petition for a writ of certiorari, then the Court of Appeals for the District of Columbia Circuit will re-examine the validity of Laffey en banc. In the event that the circuit overrules or significantly modifies the Laffey decision, there will be no conflict between the circuits for this Court to address.[2/] Furthermore, this

---

2/ The Solicitor General has cited no court of appeals decisions apart from those of the District of Columbia Circuit which adopt the Laffey rule. Respondent's research has disclosed no such decisions.

Court will have the benefit of the wisdom of the Court of Appeals for the District of Columbia, en banc, should it choose to examine the issue at a later date.

II

THE NINTH CIRCUIT DECISION IN THIS CASE IS FULLY CONSISTENT WITH BLUM v. STENSON

In Blum v. Stenson, 465 U.S. 886, 895 (1984), this Court held that statutory fee awards "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." In a footnote accompanying this passage, the Court explained that the "prevailing market rates" are those "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Id., 465 U.S. at 895 n.11. The Ninth Circuit in this case properly applied the

"reasonable community standard" established in Blum.

Because Blum involved a fee award to nonprofit legal services attorneys, the Solicitor General contends that the Court has not yet established a method for awarding hourly rates to private attorneys who have customary billing rates. Ptn. 6, 12. But the Court clearly stated in Blum that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." 465 U.S. at 894. The Court reiterated, "we decline[] to draw a distinction with respect to the use of market rates between profit and nonprofit law offices." Id. at 901 n.18. The Congressional intent identified by the Blum Court also requires that fee awards be calculated in the same manner whether plaintiff is represented by a private attorney whose

clients have a limited ability to pay or by a commercial firm.[3/]

The Court in Blum rejected the argument of the Solicitor General that awards of prevailing market rates to salaried attorneys employed by legal services organizations resulted in windfalls. The Court explained that since Congress clearly intended that prevailing market rates be awarded to all attorneys, such rates do not constitute a windfall. 465 U.S. at 895. The same "windfall" argument by the Solicitor General in this case should be rejected. An award of a prevailing market rate which may exceed a private attorney's billing rate is no more a windfall than is

---

3/ Under Blum, courts must avoid "decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." Blum, 465 U.S. at 895, quoting Stanford Daily v. Zurcher, 64 F.R.D. 680, 681 (N.D. Cal. 1974), aff'd, 550 F.3d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978).

a market rate which exceeds the cost of providing nonprofit legal services.

III

THE LAFFEY RULE SHOULD NOT BE ADOPTED, SINCE ITS RATIONALE IS WHOLLY UNPERSUASIVE

The legislative history of the attorneys' fees statutes does not support the holding in Laffey. In enacting the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. § 1988, Congress cited Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), as setting forth the appropriate standards for calculation of a fee award. S. Rep. No. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5914. Johnson discussed twelve factors for district courts to consider in awarding fees. Among those factors were "[t]he customary fee for similar work in the community" and "awards in similar litigation." 488 F.2d at 718,

719. The Johnson court did not mention the fee applicant's own billing rate and did not give it a presumptive effect.

Congress also cited Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444, 8 F.E.P. Cases 244 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975), as cases which correctly applied the standards for fee awards. S. Rep. No. 1011 at 6. The Stanford Daily court stated: "This court does not accept the attorneys' usual billing rates as definitively fixing their billing rates for this litigation." 64 F.R.D. at 684. Davis held that a proper factor is "the fee customarily charged in the locality for similar legal services." 8 F.E.P. Cases at 246. In Swann the court

based its award in part on the fees charged by defendants' counsel and on the rates charged by attorneys in federal court work. 66 F.R.D. at 485, 486. None of these cases support the Laffey proposition that an attorney's customary billing rate is presumptively his or her market rate.

Moreover, as Judge J. Skelly Wright noted in his dissenting opinion in Laffey,

> [H]ad Congress intended so straightforward an approach as equating market rates with historical billing rates, it would have said so. That it did not is itself a strong indication that a law office's billing practice is to be but one consideration among many in the required calculation.
>
> 746 F.2d at 33 (Wright, J., dissenting).

That a fee award is not to be based on one factor to the exclusion of all others was established by the Court in City of Riverside v. Rivera, ___ U.S. ___, 106 S.Ct. 2686 (1986). The Court there rejected the contention that a fee award should be calculated solely by reference to

the amount of damages recovered. The Court held that the amount of damages is "only one of many factors that a court should consider" in calculating a fee award. Id. at 2694. Laffey's focus on an attorney's customary billing rates, and disregard of all other factors such as his or her skill, experience, reputation, performance in the litigation before the court, and the prevailing community rates, is thus contrary to City of Riverside v. Rivera.

Laffey also creates an anomalous distinction between the fee awards of private practitioners and lawyers employed by nonprofit legal services organizations. Under Laffey, the former are entitled to no more than their customary billing rates; the latter are entitled to a rate based on that charged by comparable lawyers in the community. The Laffey approach makes it "conceivable that the rate awarded a first year lawyer at a Legal Aid office would

exceed that awarded to a vastly more experienced attorney whose practice, though private, was deliberately geared towards low paying clients." 746 F.2d at 33 n.4 (Wright, J., dissenting). Moreover, as Chief Judge Wald noted in his opinion in Save Our Cumberland Mountains, Laffey also requires payment of high rates to the attorney in an expensive law firm who does little pro bono work, and payment of low rates to the attorney whose practice is geared to nonpaying or lowpaying clients. 826 F.2d at 60 (Wald, C.J., concurring and dissenting). These anomalies are contrary to Blum, which requires that all attorneys be compensated according to the rates prevailing in the community for attorneys of comparable skill, experience, and reputation.

The Solicitor General asserts that an attorney's customary billing rate "accurately reflects his background, ex-

perience, and skill relative to that of other attorneys in the community." Ptn. 11. This assertion ignores the fact -- recognized even in the majority opinion of Judge Bork in Save Our Cumberland Mountains -- that an attorney's billing rate may be lower than the market rate because of the "personal satisfactions" derived by the attorney in representing certain clients. 826 F.2d at 49. Further, the attorney's lower rates may reflect the clients' ability to pay and the attorney's professional interests. Laffey, 746 F.2d at 34 (Wright, J., dissenting.) The Ninth Circuit took judicial notice in White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983) that "many civil rights practitioners do not bill their clients at an hourly commercial rate." To hold that civil rights attorneys are limited to the low rates they charge their clients would fly in the face of congressional intent

that such attorneys be compensated in the same manner as attorneys engaged in anti-trust litigation. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

Furthermore, the Solicitor General's contention that the Laffey approach is an easier, more objective, less arbitrary method of calculating fees cannot be supported. It can be as difficult to determine a "customary" billing rate as it is to determine the prevailing market rate, because an attorney may charge different rates depending on the ability of the client to pay, the attorney's professional interests, his or her personal satisfactions, and other factors. Thus, in Save Our Cumberland Mountains, one of the plaintiffs' attorneys billed his clients on the basis of their ability to pay and charged nothing to those who could afford no fee. His reduced rate -- reflecting ability to pay -- for national environmental and

conservation groups was $75 to $100 per hour. The court awarded him $100 per hour, explaining that it was giving him "the benefit of any doubt." 826 F.2d at 48. Laffey provides no principled basis for choosing an hourly rate of $100 or $75 or a figure in between. The ease, objectivity, and predictability promised by Laffey is simply an illusion.

The policy arguments advanced by the Laffey majority and the Solicitor General in this case are poor excuses for adoption of a rule that is in contravention of the legislative history of the attorneys' fees statutes and is inconsistent with Blum and other precedents of the Court. The Ninth Circuit decision rejecting Laffey was correct and should not be disturbed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERICKSON, BEASLEY & HEWITT
JOHN H. ERICKSON
LEIGH-ANN K. MIYASATO

Counsel for Respondent

November 1987

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Ruth B. Ginsburg and Bork, Circuit Judges

[Filed Oct. 14, 1987]

ORDER

Upon consideration of appellees' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

Circuit Judge Bork did not participate in this order.

Chief Judge Wald would grant the petition for rehearing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

[Filed Oct. 14, 1987]

ORDER

Appellees' suggestion for rehearing en banc has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that appellees' suggestion for rehearing en banc is granted.

A future order will govern further proceedings herein.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

Circuit Judge Bork did not participate in this order.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

[Filed Nov. 5, 1987]

ORDER

This Court's order of October 14, 1987 granted appellees' suggestion for rehearing en banc and indicated further proceedings would be controlled by a future order. On October 21, 1987 appellants filed a motion for reconsideration of the order granting rehearing en banc or in the alternative to hold the en banc proceeding in abeyance. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the motion for reconsideration is denied, and it is

FURTHER ORDERED, by the Court en banc, that the alternative motion is granted and further proceedings herein are held in abeyance pending final disposition by the Supreme Court of Case No. 87-607, Webb v. Maldonado (peti [sic] for certiorari filed

October 14, 1987), and a further order of this Court scheduling further proceedings, if necessary. Such an order will establish a schedule for the filing of briefs directed only to the following question:

> Should Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985), be overruled to the extent that it holds in awarding attorneys' fees to a private law firm that customarily charges below the prevailing community rate in order to serve a particular type of client, courts should calculate that "reasonable hourly rate" according to the hourly rates charged in similar cases by that firm, as opposed to rates that reflect the prevailing community rate for similar legal services? See Blum v. Stenson, 465 U.S. 886 (1984).

Per Curiam
FOR THE COURT
George A. Fisher,
Clerk

BY:
Robert A. Bonner
Deputy Clerk

No. 87-607

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-607

JAMES H. WEBB, JR.,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent devotes the bulk of his brief in opposition (Br. in Opp. 11-21) to a discussion of the merits of the question presented by the petition. One point respondent has raised, however, merits a brief reply.

Respondent concedes that the Ninth Circuit's decision in this case squarely conflicts with the District of Columbia Circuit's decision in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (1984), cert. denied, 472 U.S. 1021 (1985). Respondent contends (Br. in Opp. 5-11), however, that the Court should deny the petition in this case because the District of Columbia Circuit has granted rehearing en banc in *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43 (1987), in order to decide whether *Laffey* should be reconsidered. Respondent suggests that the petition in this case should be denied in order to allow the D.C. Circuit to rehear its decision in the *Cumberland Mountains* case. That argument is unpersuasive, for three reasons.

First, the District of Columbia Circuit has recently decided to hold the *Cumberland Mountains* case in abeyance pending this Court's resolution of this petition. Br. in Opp. App. 3a-4a (reprinting the D.C. Circuit's November 5, 1987, order in the *Cumberland Mountains* case).[1] Thus, the conflict between the Ninth Circuit's decision in this case and the D.C. Circuit's decision in *Laffey* is still present and should be resolved by this Court. Respondent's invitation to play Alphonse and Gaston with the D.C. Circuit should be declined.

Second, the District of Columbia Circuit appears to believe that the question presented in the *Cumberland Mountains* case differs from the question presented in this case. In the order holding the *Cumberland Mountains* case in abeyance, that court stated that any further briefing in that case would be addressed to the question whether an attorney's customary billing rate should be used to calculate a reasonable attorney's fee when counsel "customarily charges below the prevailing community rate in order to serve a particular type of client" (Br. in Opp. App. 4a). This case does not involve that claim. Here, respondent's counsel had the same customary hourly billing rate for every type of client and legal work that he performed (Pet. 4-5). For that reason, a decision by the D.C.

[1] The District of Columbia Circuit granted rehearing en banc in the *Cumberland Mountains* case without asking the government for a response to the en banc suggestion. Once the government learned of the court's order, we brought to the court's attention the pending petition in this case, and we asked the court to reconsider its decision to rehear the case en banc, or to hold that case in abeyance pending this Court's disposition of the petition in this case. On November 5, 1987, the D.C. Circuit entered an order denying our motion for reconsideration, but holding the *Cumberland Mountains* case in abeyance pending this Court's disposition of the petition in this case. Br. in Opp. App. 3a-4a.

Circuit in the *Cumberland Mountains* case appears unlikely to resolve the question presented by this case.[2]

Third, any dispute among the panel members in the *Cumberland Mountains* case on the question whether the D.C. Circuit's earlier decision in *Laffey* is correct hinges on the proper interpretation of this Court's decision in *Blum* v. *Stenson,* 465 U.S. 886 (1984), and the application of Blum to a case in which counsel has an established hourly billing rate. An authoritative construction of *Blum*'s application to such facts is necessary and can only be provided by this Court.

In sum, the District of Columbia Circuit's actions in the *Cumberland Mountains* case provide no basis for denying the petition here.

For the foregoing reasons and those given in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

[2] We contemplate addressing in our brief on the merits in this case, however, the question raised by the District of Columbia Circuit in the *Cumberland Mountains* case.

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60117

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

JAMES H. WEBB, JR., SECRETARY OF THE NAVY *v.*
CARMELO MALDONADO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-607. Decided December 14, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In *Blum* v. *Stetson*, 465 U. S. 886 (1984), the Court defined what constitutes a "reasonable attorney's fee" under 42 U. S. C. § 1988 for salaried attorneys employed by legal aid organizations. We held that the fee awards of such attorneys must be calculated on the basis of the prevailing community rate for similar services by attorneys of comparable skill, experience, and reputation. *Id.*, at 895–896, and n. 11. We did not decide whether the fee awards of private attorneys with an established billing rate must be calculated in the same manner.

Here, the Court of Appeals for the Ninth Circuit upheld an attorney's fee award under 42 U. S. C. § 2000e–5(k) based on an hourly rate that was consistent with the prevailing market rate but that substantially exceeded counsel's own customary billing rate. The court expressly rejected the approach adopted by the Court of Appeals for the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 746 F. 2d 4 (1984), cert. denied, 472 U. S. 1021 (1985), which held that an attorney's customary billing rate must be used in calculating a fee award so long as that rate is not unusually high or low.

It is true that the District of Columbia Circuit recently granted rehearing en banc in *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F. 2d 43 (CADC 1987), for the purpose of deciding whether *Laffey* ought to be reconsidered. The *Cumberland Mountains* case has been held in abeyance,

however, pending the resolution of the petition for certiorari in this case. Hence, the conflict persists between the Ninth Circuit's decision in this case and the District of Columbia Circuit's decision in *Laffey*. It cannot be said with any certainty that the latter court will decide to overrule *Laffey* in whole or in part.

In addition, there is some tension between the Ninth Circuit's definition of a "reasonable" fee and other courts' definition of the term as "a fee large enough to induce competent counsel to handle the plaintiff's case, but no larger." *Lenard* v. *Argento*, 808 F. 2d 1242, 1247 (CA7 1987). See also *Coulter* v. *Tennessee*, 805 F. 2d 146, 148–149 (CA6 1986) cert. denied, —— U. S. —— (1987): "Congress did not intend that lawyers . . . receive excess compensation or incentives beyond the amount necessary to cause competent legal work to be performed." It is at least arguable that an attorney will have sufficient incentive to accept a case so long as he receives the same fee from suing the government as he would receive from suing a private party.

Finally, the question of what constitutes a "reasonable" fee for an attorney with an established billing rate is likely to arise in other circuits. The Court has previously observed that more than 100 federal statutes provide for an award of attorney's fees to the prevailing party, and that "the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. ——, —— (1986). Hence, since fee awards under all statutes that provide for "reasonable" attorney's fees are calculated in a similar manner, the petition raises an issue of considerable practical importance.

Because a conflict has arisen between two Courts of Appeals concerning the calculation of a "reasonable" fee for attorneys with established billing rates, I would grant certiorari and address the question presented by this petition.